Background Paper

COMMISSIONER OF CRITICAL INDUSTRIES

April 9, 1985

BRITISH COLUMBIA

COMMISSIONER OF CRITICAL INDUSTRIES

PURPOSE

This Act provides a mechanism to promote the viability and competitiveness of critical businesses in the Province of British Columbia.

The British Columbia economy is emerging from a severe recessionary period. Future growth is dependent upon the ability of our businesses to meet a number of new challenges. Among these are a need to integrate new technologies and the need to more effectively use human resources by upgrading skills and developing more productive systems. However, those developments must be built upon the economic foundation of our existing industrial base. This industrial base must be preserved and enhanced.

Certain industries are critical to the future well-being of our Province or a particular region of locality within the Province. What we have been witnessing over the past few years is a loss of financial viability of some of these industries. In some cases we have seen actual closures and employment losses, as weak commodity process and third-world competition have put unbearable cost pressures on B.C. firms. The restoration of their financial well-being and competitiveness is of paramount importance.

A critical business may lose financial viability for many reasons. For example, a firm may become uneconomic as a result of a heavy debt obligation, aging technology, a productivity-restricting labour agreement or an onerous tax burden. Throughout the world -- and in British Columbia -- the cost-price squeeze has hit particularly hard in the resource industries. In many cases an enterprise could be economically viable but it is hampered by the demands of conflicting interests. There simply is no vehicle to bring all interests into the process of making trade-offs. With the loss of financial viability of course, the loss of competitiveness and jobs inevitably follows.

A critical business may require new investment to restore competitiveness. Often governments are asked to contribute by way of incentives, grants, etc. However, there is no mechanism at present, to ensure that other significant interests -- municipalities, banks, trade unions, etc., are brought to the table to demonstrate in a tangible way their willingness to share equally a commitment to competitiveness.

Thus, a critical industry faced with an intractable creditor, a demanding trade union or an uncompromising taxing authority may be unable to realize its full growth potential and in some cases may fail altogether. Alternatively, the business may be unable to proceed with required new investment. The common good -- the continuing benefits success bestows upon the entire Province -- is lost as a result of each actor pursuing a course designed to maximize his own self-interest. In such situations an agency of government has a very distinct and positive role to play. That role is to facilitate the pursuit of the common good, to prevail upon all actors to make the compromises which will invigorate the critical business and maximize the benefits that business bestows upon all British Columbians.

In the case of a critical business that is in financial difficulty, the Commission must analyze the firm's chances for survival, determine the conditions required for such survival and map out a strategy for revival. In many cases, the firm's situation may be irretrievable. However, in other cases, it may be that compromises on behalf of creditors, trade unions and the taxing authorities -- and the commitments made on behalf of the firm -- will result in the reinvigoration of the firm.

In the case of a critical business proposing a new investment and requesting government aid, the Commissioner must analyze the benefit proposal and consider an equitable sharing of the costs. A strategy for renewal may involve a combination of a number of compromises and reallocations. It may involve the elimination of certain non-competitive components of the industry, the modification of work rules or wage patterns in the labour agreement, the restructuring of creditors' loan arrangements or deferral or forgiveness of tax obligations. As a quid pro quo for such reallocations and compromises, the firm may be called upon to make certain commitments, such as re-training, or re-investment in new technology.

In each case the problems facing the firm are likely to be unique to that firm. As a result, the reallocations and compromises necessary to save the firm or allow an investment to proceed must also be unique. A Commissioner with broad powers of consultation and mediation will be able to determine the particular needs of the enterprise, analyze the kinds of reallocations and compromises required and then propose a course of action which will allow the parties to preserve the financial viability and enhance the competitiveness of the firm. An independent, neutral authority can bring together all affected parties in a concerted, cooperative effort to save critical businesses and their employees from stagnation, plant closures or bankruptcies.

SCOPE

The Act is drafted to cover all industries within British Columbia, but an industry will not actually be made subject to the Act until it is so designated by the government upon the report of the Commissioner. In this way the Commissioner will be able to focus his initial concentration upon a limited number of firms.

This initial concentration upon a limited number of industries has a number of advantages.

First, it gives the Commissioner an opportunity to focus his efforts on truly critical industries. This will serve to maximize the overall benefit to be derived from the legislation.

Second, the Commissioner can develop more effective practices and procedures if he is able to concentrate upon a limited number of industries. Since the Commissioner's mandate is, initially at least, restricted to the two critical industries of mining and forest, he can concentrate his approach upon the particular problems facing those industries. In this way, the Commissioner will quickly develop his expertise within the industry. He will become familiar with the modes of production, the actors and the market conditions of the industry. Concentrated exposure can only enhance the Commissioner's ability to develop effective strategies tailored to remedy the problems unique to a particular industry.

Finally, a concentration upon two industries will allow both the commissioner and the government to quickly and effectively assess the legislation's strengths and weaknesses.

The task is a sensitive and difficult one. The Commissioner will have to go through an initial learning process. He will have to "feel his way" through the Act. The more industries he must deal with the longer that learning process will be because the Commissioner will bear the burden of becoming acquainted with the characteristics and needs of a number of distinct industries.

Once an industry has been designated by regulations this does not mean that all firms within that industry will automatically qualify for assistance under the Act. The Commissioner is given discretion in this regard. In exercising this discretion, the key consideration will be importance of the firm to a particular locality within the Province or to the Province as a whole.

ADMINISTRATION

The administration of the Act is through an independent Commissioner. The statutory objective is to restore the viability and competitiveness of firms by pursuing voluntary reallocations among the various firms, associations and agencies with whom a subject enterprise deals. The Commissioner is also given authority to review the case of any firm requesting government support and/or assistance for new investment designed to restore/enhance competitiveness.

To achieve these objectives, the Commissioner is given the power to provide mediation and consultation services. He has the power to issue recommendations. These recommendations are not binding. Their purpose is to assist the parties in restructuring the affairs of the business enterprise. At the same time, though, it is recognized that the issuance of recommendations may prod a party to take a more reasonable position.

In exercising his powers, the Commissioner will examine, inter alia, the contractual relationships of the firm with its creditors, the contractual relationships with employees, the actual operations of the company, hydro charges, water taxes and other forms of government taxes and surcharges.

We will not turn to a summary of how the administrative process under the Act has been structured:

i. Initiation of the Process

The process is initiated by an application from either the business enterprise or the employees of the enterprise. Once an application is received, the Commissioner must first determine whether the business enterprise involved comes within the industries designated under the Act. The Commissioner is given broad discretion to make this determination.

If the Commissioner decides that the enterprise comes within one of the industries designated under the Act, he must then have regard to two other considerations in determining whether to provide his assistance to this enterprise:

1) the economic importance of the business enterprise to the Province or to a region or locality within the Province;

2) the likelihood that the business enterprise and other interested parties will be able to make arrangements or reach agreements conducive to the effective operation of the business enterprise.

In making these determinations, the Commissioner will have to undertake a preliminary review of the situation of the business enterprise.

ii) Procedures of the Commissioner

The Commissioner will be the master of his own procedures. He can provide whatever mediative and consultative services he deems appropriate. He can also retain whatever consultants he believes are necessary to assist him in this process.

If at any stage, the Commissioner believes that he can no longer be of assistance, he is free to withdraw his services. He may also issue recommendations if he believes that this will assist in the restructuring process.

It will be the responsibility of the Commissioner to make sure that all interested parties, including public bodies, are invited to participate. It is important that everyone having a stake in this enterprise be included in the restructuring process.

iii) Economic Plans

In most, if not all cases, the business enterprise will be seeking some form of concession from either the government or some governmental agency. The Commissioner's role is to determine if concessions are appropriate and if so under what circumstances.

In making this determination, the Commissioner must take into account the need for such a concession. It may be that the business enterprise is beyond recovery and that there is no point in the government making a concession. On the other hand, the company may be in quite a healthy position in which case government concessions are really not required.

The Act contains a schedule listing the public authorities that are empowered to make concessions pursuant to the Act. Representatives from the public bodies from which concessions are being sought will take part in the mediative process. These representatives will be free to give their views to the Commissioner on any proposed economic plan.

Before any public body can formally agree to give concessions under the Critical Industries Act, the Commissioner must approve the proposed arrangement. In deciding whether to give his approval, the Commissioner must decide whether the arrangement involves an equal sharing of the burdens of restoring or enhancing competitiveness of the business enterprise. In the typical case, the Commissioner will look to the business enterprise itself, the employees of the business enterprise and to the creditors and other outside parties having relationships with the business enterprise to see whether commitments are appropriate from these parties.

In the course of his mediative efforts, the Commissioner should get a good sense of whether these will be agreement from all parties to an economic plan. However, the Commissioner's approval of a plan does not give the plan itself legal effect. The execution of the plan is left to the parties and is voluntary on the part of all of the parties, including the public bodies involved. The Commissioner's approval of a plan does not commit anyone to it. But, if one or more of the participants in the plan decides not to take part in it, the Commissioner's approval is thereby vitiated. This means no concessions can then be given by a public authority, because its power to do so is dependent on the Commissioner's approval.

In sum, the approval of an economic plan has no legally binding effect on anyone. The parties are left to make the necessary legal arrangements to carry out the plan. It must be stressed, though, that before a public body can give concessions pursuant to an economic plan there must be legally binding commitments from the other participants in the plan.

The various commitments under the plan will typically be for a specified time period. It may well be, though, that as events unfold, these commitments need to be revised. If there is agreement by all participants to the proposed changes to the plan, the plan can be modified accordingly. The Commissioner's approval to any modification is not required.

Enforcement of the terms of an economic plan is left to the parties. As stated above, the plan itself has no legal effect. This is what becomes enforceable, not the plan itself. The Commissioner then will have no role in the enforcement process.

INTERESTED PARTIES AND PUBLIC BODIES

In performing his functions, the Commissioner must determine what sort of adjustments can be made to restore or enhance the competitiveness of the business enterprise. This will involve an assessment of the relationships of the business enterprise. It will also involve a consideration of whether any assistance is required from any of the public bodies listed in the Schedule to the Act. In practice, the following actors may be involved in the restructuring process.

i. Creditors

The Commissioner must determine whether the firm's debt burden is a barrier to competitiveness. If so, there are a number of remedies which have to be considered. These include restructuring of debt repayments, deferral of interest or interest rate reduction. The Commissioner will examine the possibility of altering loan agreement security provisions which affect a firm's equipment, accounts receivable or other assets. In many situations, such security arrangements can provide a barrier to retooling, asset liquidation or other forms of financial restructuring. Finally, there are other contractual security devices which may affect the position of the business enterprise. An example of such a provision is the contractual power to appoint a receiver or receiver/manager. Where a creditor possesses such a contractual power, the Commissioner may want to seek a commitment that it will not be used for a certain period of time.

ii) Trade Creditors

The Commissioner will also consider whether there are any problems arising from a large trade debt. Accordingly, the Commissioner must consider the business enterprise's relationship with its landlord, suppliers and others that fall into this category.

iii) Trade Unions

There are a number of provisions in collective agreements which may impair a firm's competitiveness and which the Commissioner may wish to consider. These may include manning and scheduling requirements, wage rates, job classifications and fringe benefits.

iv) Public Authorities

There are a host of governmental agencies and crown corporations whose activities may affect the business enterprises. Hydro charges and water taxes are an example of the financial obligations which a firm may encounter.

The Act will contain a schedule of public authorities who will be empowered to make concessions under the Act. These concessions may be either substantive or procedural in nature. By substantive, it is meant an actual reduction in the charges or fees, etc. that are payable to the public agency. By procedural, we mean the actual administrative processes of the public body. It may well be that in certain circumstances some procedural short-cuts are required.

It must be recognized that the granting of concessions to certain firms is, in effect, a benefit that will not necessarily be given to other firms, even within the same industry. This may lead to an unfair competitive advantage, which is something that the Commissioner must take into account in determining whether a concession is appropriate.

Given this problem and other difficulties associated with exempting individual firms, it is proposed that when the Commissioner considers the granting of a concession, he also take into account the global viewpoint. That is, when the Commissioner considers how statutory standards affect the applicant enterprise, he should also consider in general the situations of other firms in the industry. In certain cases, he may want to meet with the other firms in the industry so that he can get a better overall industry perspective.

v) The Business Enterprise

The Commissioner must also determine whether commitments are required from the business enterprise and its employees. In the usual case, such commitments will be required if the Commissioner is to give his approval to any governmental concessions. The whole purpose of the program is to ensure that there is an equal sharing of the burdens of restoring the enhancing and competitiveness of the business enterprise.

CONCLUSION

The Commissioner's role is to provide assistance to critical industries to make them more competitive. He has no powers of compulsion. Participation is voluntary on the part of everyone, including the public bodies from which concessions are being sought. The Commissioner, in effect, acts as a buffer between the business enterprise and these public bodies. The public bodies cannot agree to any concessions without the approval by the Commissioner of an economic plan. This economic plan will usually entail commitments from the business enterprise itself and from other interested parties. There is expected to be a sharing of the burdens of enhancing and restoring the competitiveness of, and employment in, the business enterprise.